(236)

UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/AC.4/1992/3
11 May 1992

ENGLISH
Original: ENGLISH/SPANISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Working Group on Indigenous Populations
Tenth session
20-31 July 1992
Item 4 of the provisional agenda

STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS POPULATIONS

Note by the Secretary-General

Information received from non-governmental organizations

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GE.92-12449/4554B

Introduction

1. By its resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually, and to give special attention to the evolution of standards concerning the rights of indigenous populations.

2. The Sub-Commission, in its resolution 1991/30 of 29 August 1991, requested the Secretary-General to transmit the report of the Working Group to indigenous peoples' and non-governmental organizations for specific comments and suggestions for the completion of the first reading of the text of the draft declaration on the rights of the indigenous populations, as contained in annex II of the report of the Working Group on Indigenous Populations on its ninth session (E/CN.4/Sub.2/1991/40/Rev.1), and the beginning of the second reading at the tenth session of the Working Group. The Commission on Human Rights endorsed this request in its resolution 1992/44 of 3 March 1992. In accordance with these resolutions, appropriate communications were sent to intergovernmental organizations.

3. The present document contains replies received as of 11 May 1992 from indigenous and non-governmental organizations. Further replies, if any, will be included in addenda to this document.

Centro de Culturas Indias CHIRAPAQ

[17 March 1992]
[Original: Spanish]

Comments on part II

1. The fundamental idea of the draft declaration, as prepared so far by the Working Group, has been to protect indigenous rights in peace time, but no provision has been made for the protection of indigenous rights in the context of either international or non-international war. It is only in Part II, operative paragraph 4 that a reference is made to the need to protect the indigenous peoples against genocide, which can be committed in both peace time and in time of war, according to the Convention on the Prevention and Punishment of the Crime of Genocide.

2. In our view, it is necessary to elaborate further the idea of the protection of the human rights of indigenous peoples in time of war and to stress that States should respect the international standards on the protection of civilian persons in time of war laid down in the Fourth Geneva Convention of 1949 and the Additional Protocols of 1977, particularly in the regions inhabited by indigenous peoples. When non-international armed conflict occurs in countries where indigenous peoples live, the percentage of victims among the indigenous population is much higher than the percentage that this population represents in the total population of the country. There are instances where the indigenous victims account for 90 per cent of all the

victims resulting from the armed conflict. This is due largely to the fact that States fail to respect the international instruments on the protection of the civilian population in situations of armed conflict in the indigenous areas under military occupation. The following provisions are often violated:

(a) The Occupying Power may not compel the civilian population to serve in its armed forces and to participate in armed action (Fourth Geneva Convention, art. 51). Consequently, if in the context of a non-international armed conflict regions inhabited by indigenous peoples are subjected to military occupation, States cannot justify the formation of irregular groups in the service of the armed forces, utilizing the traditional indigenous customs, because the right to autonomy and self-defence can never be used against the indigenous people, nor serve to evade national and international legal provisions;

(b) The prohibition of deportations or forcible transfers of the civilian population within the area under military occupation (Fourth Geneva Convention, art. 49; Protocol I, art. 85. 4a and Protocol II, art. 17). The indigenous population cannot therefore be compelled to abandon its communities of origin, nor can it be transferred and herded into an area close to military bases, where it has no means of subsistence and where it is the victim of armed confrontations;

(c) The prohibition to starve the civilian population, by requisitioning or destroying foodstuffs or other objects indispendsable to its survival (Fourth Geneva Convention, art. 55; Protocol I, art. 54 and Protocol II, art. 14). The indigenous population should not be deprived of its means of survival or subjected to starvation, by being prevented from the normal pursuit of its activities of production, by being denied access to natural resources or by having its food requisitioned.

Suggestions

3. We suggest that part II, operative paragraph 4 of the text drafted so far by the Working Group, which reads: "Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person", should continue as follows:

"States are bound to strict observance, in the regions inhabited by indigenous peoples, of the international provisions regarding the protection of the civilian population in situations of armed conflict. The right to indigenous autonomy can never be used against the indigenous peoples or to evade national legislation or international law.

States shall not:

(a) Occupy indigenous territories militarily;

(b) Organize indigenous peoples into irregular groups in the service of the armed forces and compel them to take part in military operations or bring indigenous peoples into confrontation with other indigenous peoples, using the traditional customs and the right of self-defence to justify these measures;

(c) Compel the indigenous population to abandon its communities or to be displaced or concentrated in specific areas in order to subject it to military control, requisition its means of survival, prevent it from the normal pursuit of its production activities or deny it access to natural resources."

Comments regarding part III

4. Part III of the draft declaration deals with the territorial rights of the indigenous peoples. We are inclined to use the concept of "territory" instead of "lands" because "territory" better expresses a comprehensive view encompassing natural resources, cultural aspects and the environment.

5. However, in practice, the concept of territory or of the lands which the indigenous peoples have traditionally occupied is misinterpreted; we therefore feel that it is necessary to specify its scope in the declaration. In the same way that we advocate that the indigenous people should be recognized in their entirety and not be fragmented into smaller units, we must also raise the question of the recognition of the whole territory inhabited by an indigenous people or by various indigenous peoples, if they have traditionally lived together in the same territory. No artificial boundaries should be created using criteria which are alien to the practices of the indigenous territory, nor should the break-up or fragmentation of this territory be allowed. States must not confine themselves to recognizing local settlements or portions of the indigenous territory separately, because such a move would contribute to the break-up of the indigenous people and the creation of divisions among them. No concentration or reduction should be allowed of those indigenous people who have a pattern of living in scattered settlements or who are nomads, in order to empty vast tracts of their traditional territory and to give recognition only to isolated clusters of settlements.

Suggestions

6. We suggest that part III, paragraph 12 should be worded as follows:

"The right to obtain from States protection and global recognition without the fragmentation of the territories which the indigenous people have traditionally occupied and used, including the collective and individual right to ownership, possession and use of lands and resources. States may not use the indigenous territories that were evacuated through forced displacement in circumstances affecting indigenous survival".

Suggestions regarding part V

7. We propose that the following wording should be added to the end of paragraph 23:

"The right to autonomy must never be distorted and used against the interests of the indigenous people".

8. We propose that paragraph 24 should be expanded as follows:

"The right to maintain and decide upon the structures of their autonomous institutions, without the regulation, superimposition or replacement of such institutions by institutions created by States".

Indian Council of South America

[30 April 1992]
[Original: Spanish]

Overall, the draft meets our basic requirements. Nevertheless, the aspirations of our indigenous peoples are much higher than what can be achieved, namely a general consensus. As we see it, there are still very marked differences in the opinions of national Governments and our views and the claims that we are making under customary law. We believe that the draft document is on the right track, provided that it is supplemented by other documents of positive law already in force. However, we would like to comment on some of the terms used in the paragraphs of the draft, in order to make it more easily understood and to avoid confusion.

A. PREAMBULAR AND OPERATIVE PARAGRAPHS OF THE DRAFT

Twelfth preambular paragraph

"Believing ... in a spirit of coexistence with other citizens". The word "talante" (spirit) is not understood by the majority of indigenous communities, peoples and organizations. We propose that a more comprehensible alternative should be used, as follows:

"Believing ... with goodwill and the desire for coexistence with other citizens".

PART I

Operative paragraph 1

"Indigenous peoples ... social, cultural and spiritual development in conditions of freedom and dignity."

We think that this text is incomplete, and that the words "equality" and "tolerance" should be added. The text would therefore read:

"Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom, equality, tolerance and dignity."

PART II

Operative paragraph 5

"Indigenous peoples have ... to self-identification."

The last word of the text, "self-identification", should refer specifically to the aspect of identity.

We propose the following wording: "Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to their own identity."

Operative paragraph 10

"Indigenous peoples have the right to all forms of education, including ... for these purposes."

In this paragraph, the word "including" should be deleted because the indigenous peoples have the right to all forms of education, which is basically the right to use their own languages alternately with the other languages.

We propose the following wording: "Indigenous peoples have the right to all forms of education, access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes."

PART III

Operative paragraph 17

"Indigenous peoples have the right ... shall not take place in their lands and territories."

In this paragraph the words "respect for" should be added after the words "right to".

We propose the following wording: "Indigenous peoples have the right to respect for and protection of their environment and productivity of their lands and territories and the right to adequate assistance including international cooperation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories."

PART IV

Draft operative paragraph 20

"The right to determine ... affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions;".

In this paragraph the words "affecting them" should be replaced by "which respond to their specific needs", because this renders the idea of totality.

We propose the following text: "The right to determine, plan and implement all health, housing and other social and economic programmes which respond to their specific needs, and as far as possible to develop, plan and implement such programmes through their own institutions;".

Comisión Jurídica de los Pueblos de Integración Tawantinsuyana

[21 March 1992]
[Original: Spanish]

Comments

We wish to make the following impartial comments regarding the ninth session of the Working Group in 1991:

(a) The organizers/rapporteurs and the representatives of the indigenous organizations were all given the opportunity to express themselves in a democratic manner;

(b) The experiences described by each people and the participating representatives were very useful;

(c) The legal instrument which is being discussed, namely the declaration, is a supranational instrument that will lay the foundations for the next century;

(d) Most of the participants representing their organizations had little legal expertise;

(e) The debate was serious and of a high standard;

(f) There was a lack of interest in the debate on the part of some of the participants, who were more concerned with making appointments to obtain financial support for their organizations.

Suggestions

1. The draft declaration which is being discussed should be used to promote the new indigenous legislation, and its codification within international indigenous law.

2. The legal approach should also be to seek to promote development, and to find parallel law or alternative and indigenous law.

3. The text of the draft declaration should project the new relationship between nation States and indigenous peoples.

4. The draft declaration should incline towards new models of legal pluralism.

5. The draft declaration should promote respect for the traditional systems and legal institutions of the indigenous peoples.

6. There should be more participation by indigenous jurists, for example as rapporteurs.

7. Greater legal expertise is required in the drafting of the declaration.

8. Efforts should be made to safeguard the World Conference, which is a forum of brotherhood and law, by ensuring that it is conducted democratically.

9. The working documents should be made available to all the participants in the required languages, including Spanish.

10. The new version of the paragraphs of the draft declaration discussed during the ninth session should be forwarded promptly to the participants so that they can prepare themselves properly rather than just reading through and not doing much analysis and study.

11. The draft declaration should be disseminated more widely, especially to those who are participating or have participated in any of the sessions, in order to enable them to continue to work on improving the text.

"Tupay Katari" Movement

[30 April 1992]
[Original: Spanish]

1. The amendments to the preambular paragraphs and the operative paragraphs, which address issues that are more of substance than of form, are designed to classify certain legal concepts and to contribute to the formulation of provisions that are effective and coherent, as regards both their interpretation and their practical application, in keeping with the spirit of the international instruments on the subject.

2. Finally, in order to respond to the cherished aspirations of the indigenous peoples, new paragraphs and articles should be added with a view to guaranteeing the effective exercise of their land rights and their right to utilize their natural resources, which are considered as being vital to the survival of indigenous life.

First preambular paragraph

3. Affirming that all indigenous people are born free and equal in dignity and rights in accordance with the international standards in force, while recognizing the right of all individuals and groups to be different, to consider themselves different and to be respected as such.

Second preambular paragraph

4. Considering that, like all peoples of the world, the indigenous nations have contributed enormously through their age-old cultures and ancestral traditions to the progress of civilizations and hence to the enrichment of the diversity and plurality of the universal cultures which constitute the common heritage of humankind.

Fourth preambular paragraph (to be inserted as a new paragraph)

5. Recognizing that, as a result of the conquest of the Americas, the pre-Columbian indigenous peoples were unjustly dispossessed of their lands and subjected to a system of servitude which resulted in the unjust, inequitable

and imperfect distribution of land, and degrading forms of labour. This implies that the colonial legacy is the expression and the root cause of the denial of the rights and fundamental freedoms of the indigenous peoples as well as the systematic violations thereof, the state of poverty in which they live and the racial discrimination and oppression which they endure.

Sixth preambular paragraph

6. Recognizing the urgent need to promote and respect the rights of indigenous peoples and nations to their own identity, in particular, to the diversity of their cultural manifestations and their linguistic expressions, as well as the right to their social structures, legal institutions and philosophical concepts which without doubt constitute the driving force of their history.

PART I

Operative paragraph 1

7. Indigenous peoples have the full right to self-determination, in accordance with international law. By virtue of this inalienable right, they shall freely determine their own way of life and political institutions, shall promote their own economic, social and cultural development and shall democratically elect their representatives and authorities, in conformity with their customs, practices and established standards and in a spirit of coexistence and mutual understanding with other members of the national community. It is the duty of the State to guarantee the effective exercise of the right to self-determination.

Operative paragraph 2

6. The following should be added at the end of the paragraph: "Any impediment or hindrance to the free exercise of these rights is contrary to the universally recognized principles of human rights".

Operative paragraph 3

7. Indigenous people are free and have the right to full participation in the conduct of public affairs with the same rights and obligations as all other human beings. No one shall be subjected to racial discrimination on the basis of his indigenous identity and social origin or compelled to provide personal labour without just remuneration or his full consent.

PART II

Operative paragraph 4

8. Indigenous peoples have the full right to live in dignity and peace, to work in peace and to security. It is the duty of States to protect indigenous communities and individuals against the various manifestations of genocide and to guarantee the true exercise of these rights and freedoms, by ensuring the physical and mental integrity of the human being.

Operative paragraph 6

9. Indigenous peoples have the collective and individual right to security and protection from any acts of ethnocide and cultural genocide, which are acts condemned by the international community as crimes against humanity. Appropriate protection, prevention and redress are applicable to:

(a) Any unlawful act which has the aim of depriving the indigenous populations of their identity, through the use of coercive methods;

(b) Any measure of assimilation, alienation or integration, carried out through pressure or intimidation, including the use of force to the detriment of and with disregard for the indigenous cultures and philosophies;

(c) Any arbitrary dispossession of the indigenous populations of the lands and resources which they have occupied and exploited since time immemorial;

(d) Any act involving the use of force to impose upon the indigenous peoples alien cultures, religions, creeds and ways of life whose content is incompatible with the indigenous perception of the universe and nature;

(e) Any racist propaganda, incitement to violence, hatred and intolerance which might offend the dignity and harm the life of indigenous peoples and nations.

Operative paragraph 7

10. Indigenous peoples have the imprescriptible right to revive, preserve and express their cultural identity and traditions in the appropriate manner. By virtue of this right, the indigenous populations and communities have full powers to safeguard and promote the constant development of their past and present cultural and artistic traditions, such as historical sites, archaeological ruins, works of art and sculpture, musical instruments, artefacts, designs and scientific and technical knowledge. This right also invests the indigenous populations with the power to claim restitution of the cultural and spiritual property and goods taken from them illegally, without their free consent and in violation of the provisions and laws of the country, and the consequent reparation for material and moral damage.

Operative paragraph 9

11. Indigenous peoples have the right to restore, use, develop and transmit to future generations their own history and, community values, their languages and their writing systems and literature, as well as the right to maintain the original names of their communities, to pay tribute to the memory of their martyrs and to respect their sacred and mythological sites. It is the duty of States to adopt appropriate measures to ensure that the indigenous peoples are duly heard and heeded and can make themselves understood in political, legal and administrative proceedings, where necessary through the provision of interpretation and other effective means of communication.

Operative paragraph 10

12. Indigenous peoples have the full right to comprehensive and diversified education, in particular basic and higher education in their own languages and the right to establish, administer and control their own educational systems and institutions. States shall recognize education as the highest duty and shall therefore provide the necessary resources for the execution of and compliance with the stipulated provisions.

PART III

Operative paragraph 14

13. Indigenous peoples and nations have the right to maintain their profound integral and spiritual relationship of respect for and love of Mother Earth, which has been considered from time immemorial as the source of all life and the factor that creates balance and harmony between man and nature. By virtue of this established right, the lands and territories, including the resources thereof, traditionally occupied and used by the indigenous populations are inalienable, indivisible, imprescriptible and not subject to confiscation.

New operative paragraph (to be numbered)

14. States, as the representatives of the national community concerned, shall guarantee the indigenous peoples the original right to collective and individual ownership of their lands, and the possession, use and enjoyment thereof, in particular the right to the renewable and non-renewable natural resources of the soil and subsoil, the water resources, flora and fauna, forest reserves, water and air, in accordance with their customs and with their material and spiritual needs.

New operative paragraph (to be numbered)

15. Barring a decision to the contrary and an agreement between the parties, the creation of limited-liability companies and limited partnerships on indigenous lands, and the exploitation and illegal use by transnational corporations of the resources and strategic reserves thereof, are forbidden. States have an obligation to adopt effective measures to ensure the genuine exercise of the right to ownership of the land and its natural resources, by protecting them against any act of illegal seizure.

New operative paragraph (to be numbered)

16. The agro-industrial activities of multinational enterprises shall be subject to special regulations and shall preferably be governed by the indigenous laws. States shall consult the indigenous peoples and obtain their free consent before granting transnational corporations any concessions for the exploration and exploitation of strategic resources in indigenous territories.

New operative paragraph (to be numbered)

17. The use of the lands, territories and the strategic resources thereof, which are owned by the indigenous peoples, for military purposes, or for the establishment of weapons factories, or for the storage of radioactive and toxic wastes which might pollute the environment and threaten the life of the populations, is forbidden. Indigenous peoples reserve the right to take legal measures to protect their lands and resources until their territories have been completely and totally demilitarized.

Operative paragraph 16

18. Indigenous peoples have the right to the restitution of the lands which were usurped and the territories of which they were dispossessed by coercive means, with the subsequent confiscation of their property without their free consent, by virtue of theories based upon or related to the discovery of America and the concepts of terra nullius, and uncultivated lands. In response to the legitimate claims of the indigenous peoples, States shall guarantee just and equitable compensation for the lands, property and belongings of which they have been deprived. If the parties to a dispute reach an agreement, the compensation shall preferably take the form of a grant of suitable arable land, equal to or better than the land they had previously owned in terms of quality and legal status.

Operative paragraph 18

19. Indigenous peoples have the right to adequate protection of their intellectual property, in particular the rights relating to the preservation of their age-old cultures, literary, artistic and scientific works, artists' interpretations and performances, radio broadcasts, inventions in all the areas of human activity, designs, models and trade marks, and the protection of medicinal and sacred plants.

PART V

Operative paragraph 21

20. Indigenous peoples enjoy the full right to active participation on an equal footing with all other citizens and without discrimination of any kind in the political, economic, social and cultural life of the State of which they are members, in accordance with the legal provisions on the subject. The State shall guarantee the effective exercise of political and economic rights so that specific characteristics and customs and established standards are duly reflected in the legal system and the political institutions of the State and that the ancestral ways of life and practices of community labour are recognized and given due consideration in the formulation of national economic and cultural development programmes.

Operative paragraph 22

21. (a) The right to full participation in the conduct of public affairs, through representatives chosen by themselves, in both the formulation of any indigenous policies and laws at the national and international levels, and the process of their adoption and implementation, which may affect the rights, freedoms, lives and destinies of indigenous peoples and nations.

(b) (No change.)

Operative paragraph 23

22. By virtue of the principle of the self-determination of peoples and nations, indigenous populations are recognized as having the collective right to autonomy in regard to their internal political and administrative system, and they shall have the authority to administer their lands and resources, to promote education, culture, the information and mass communications media, religion, health, housing and social welfare, to settle disputes by peaceful means, to ensure the protection of the environment, and to oversee local taxation for the financing of autonomous programmes. States have the duty to meet the just aspirations of indigenous peoples to freedom and economic and social well-being.

Operative paragraph 26

23. The right to maintain and develop contacts and cooperative relations, including cultural and social exchanges and trade, with fellow Indian peoples within States and across State boundaries in a spirit of common interest, friendship and peace in the world. It is the duty of States to adopt appropriate measures to ensure the observance and application of these rights.

Food First Information and Action Network (FIAN)

[12 March 1992]
[Original: English]

1. FIAN's expertise is in the field of the human right to food. In many situations the full-fledged right to food, which is in particular a right to feed oneself, can only be safeguarded by protecting or fulfilling land rights. Therefore land rights and the right to land has been a focus of FIAN's work. For more than five years FIAN has been struggling against violations of land rights. This involved the rights of peasants and the rural landless, but in at least 50 per cent of the cases FIAN became active on behalf of indigenous peoples' land rights. For indigenous peoples land is life.

2. On the basis of this experience FIAN welcomes the current draft universal declaration. It contains practically all the aspects we encountered in our work with indigenous peoples' land rights. FIAN welcomes in particular the operative paragraphs 6 (c), 14, 15, 16, 17, draft 18.

3. We would like to make a few minor suggestions. To operative paragraph 18 the words "including in particular seeds and genetic resources" could be added for emphasis, since these are an important resource for food and other agricultural production developed by indigenous peoples. In draft operative paragraph 18 the passage from operative paragraph 16 that "compensation shall preferably take the form of lands and territories ... equal to those which were lost" or some shorter version may be added for clarity.

Service, Peace and Justice in Latin America

[20 March 1992]
[Original: Spanish]

1. We have read the report and we think that both the preambular and operative paragraphs of the draft declaration on the rights of indigenous peoples are good, because they implicitly recognize that indigenous peoples are different ethnic groups with the right to their own culture.

2. The paragraphs that recognize the right of indigenous peoples to land and territories are important not only because they have occupied and farmed them from the time of their ancestors but also because they are the groups which have preserved the environment and nature in excellent condition.

3. Operative paragraph 20 is important because it recognizes the right of indigenous peoples to participate with other citizens in the life of the State.

Other comments

4. Part I, operative paragraph 1 states that: "Indigenous peoples have the right to self-determination, in accordance ..."; we feel that a clarification to the effect that indigenous peoples are nations living within States is necessary.

5. In our opinion, the ninth preambular paragraph, which speaks of the demilitarization of the lands and territories of indigenous peoples, is excellent, especially now when there is a military presence in many Latin American indigenous territories.

6. In part II, we fully agree with operative paragraph 12 regarding the indigenous peoples' right to the use of and access to all the different types of communications media in their own languages.

7. Part III, operative paragraph 16 is excellent because it recognizes the right of indigenous peoples to restitution of or compensation for lands and territories.

8. We would only add that in our view reference should also be made to the right of indigenous peoples to be recognized as producers, who have a contribution to make to the economic activity of States.